IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MOSES LAKE CONSTRUCTION COMPANY, INC. a Washington Corporation, d/b/a MOSES LAKE MACHINERY,	)	**No. 23587-4-III (consolidated with No. 23588-2-III)**
Respondent and Cross-Appellant,	)	
v.	)	
MIKE M. JOHNSON and "JANE DOE" JOHNSON, husband and wife; and MIKE M. JOHNSON, INC. a Washington Corporation,	)	**Division Three**
Appellants.	)	
MOSES LAKE CONSTRUCTION COMPANY, INC., a Washington Corporation, d/b/a MOSES LAKE MACHINERY,	)	
Respondent and Cross-Appellant,	)	
v.	)	
VENTURE CONSTRUCTION ENTERPRISE, INC., Reg. #VENTUCE021R8, 5115 W. Brinkley C, Kennewick, Washington, 99338,	)	
Appellant,	)	
U S F & G, an insurance company; Bond Number 76011052776989, effective 11/20/88 and OHIO CASUALTY INSURANCE COMPANY, an	)	
	)	
	)	**UNPUBLISHED OPINION**
	)	

SCHULTHEIS, A.C.J. — Mike Johnson, manager and sole shareholder of Mike M. Johnson, Inc. and Venture Construction Enterprises, Inc., leased four trucks from Moses Lake Construction Company, Inc. (Moses Lake) for a construction project. Later, Moses Lake sued Mr. Johnson; Johnson, Inc.; and Venture for breach of contract and equitable remedies. At trial, Moses Lake's claims against Venture were dismissed with prejudice, as were several of Venture's claims against Moses Lake. On the remaining claims, Moses Lake prevailed against Johnson, Inc., but the jury found in favor of Mr. Johnson. The trial court awarded attorney fees to Moses Lake from Johnson, Inc., offsetting from that amount the fees awarded to Mr. Johnson.

On appeal, Mr. Johnson; Johnson, Inc.; and Venture challenge the trial court's dismissal of a conversion claim against Moses Lake and the award of attorney fees. Moses Lake cross-appeals the dismissal of its equitable claims against Venture, its claim to disregard the corporate structure, and the attorney fees awarded to Mr. Johnson. Because we find that the trial court did not err in dismissing the claims at issue, we affirm in part. However, we conclude that the trial court inappropriately offset the award of attorney fees, and remand for reconsideration of the attorney fees award.

Facts

Mr. Johnson is a contractor who owns and manages two construction companies:

Johnson, Inc. and Venture. Johnson, Inc. was incorporated in 1992. Venture was originally incorporated in January 1996, was dissolved in August of that year, and was reinstated in October 1998.

In July 2000, Mr. Johnson leased three dump trucks and a water truck from Moses Lake. Although the trucks were purportedly leased to Johnson, Inc., they were used by Venture for its construction projects. The leases stated that the trucks could not be subleased except by the written consent of Moses Lake; however, Mr. Johnson admitted he essentially subleased the trucks to Venture without written consent. An addendum to the lease agreements stated that the lessee could purchase any one or all of the trucks as long as notice was given 24 hours before the end of the leases and the purchase price was paid in full at the time the leases ended. Fifty percent of the rent paid would apply to the purchase price.

By mid-January 2001, Johnson, Inc. was behind two or three months in rent payments. Some time in mid-February of that year, Mr. Johnson informed Moses Lake that he wanted to buy the trucks. Moses Lake faxed a letter on February 23 to Mr. Johnson and to the bank that was arranging the financing. The letter stated that with 50 percent credited from the rent paid and with the remaining rent due, the total purchase price for the four trucks was $81,948 as of February 14.

When Michael Hansen, president of Moses Lake, had not received payment or a

response from Mr. Johnson by March 5, 2001, he called the bank and learned that Mr. Johnson had directed the bank to send a check for $61,461 as payment for three of the trucks. Apparently the check was sent to the wrong address. Mr. Hansen was not happy with the amount of the offer, which did not include past due rent, and decided to repossess the three dump trucks. (The water truck had already been returned to Moses Lake.)

With his wife, son, and father-in-law, Mr. Hansen went to the Venture project site on March 5 to get the trucks. Johnson, Inc. employees had been warned that Mr. Hansen was coming, and they had removed the truck keys, drained the batteries, drained air from the brakes, and dug a trench around the trucks. When Mr. Hansen was confronted by Johnson, Inc. employees as he tried to remove the trucks, his wife called the police and an officer arrived to make sure there was no physical altercation. The trucks were removed by Mr. Hansen without further incident. A day or two later, Mr. Hansen faxed Mr. Johnson and stated that he would accept the offered $61,461 plus an additional $3,026 (for rent owed) to purchase the three dump trucks. Mr. Johnson responded that Mr. Hansen must accept the $61,461 and return the trucks or Mr. Johnson would take Moses Lake to court.

Moses Lake fired the first volley in March 2001 by suing Mr. Johnson and Johnson, Inc. for breach of contract. Later, Moses Lake sued Venture on claims based on

implied contract, quasi contract, and quantum meruit. The complaints were consolidated and amended before trial. Johnson, Inc. and Venture responded with tort claims against Moses Lake.

At trial, the court dismissed Johnson, Inc.'s conversion claim against Moses Lake; Venture's claims of defamation, abuse of process, and malicious prosecution against Moses Lake; and Moses Lake's claims against Venture based on implied contract, quasi contract, quantum meruit, and disregard for the corporate form. The jury returned a verdict for Moses Lake against Johnson, Inc. for breach of the four lease agreements. However, the jury found that Mr. Johnson was not personally liable for breach of the agreements. The jury also found that Moses Lake was not liable on Venture's claim of contractual interference.

Each of the leases contains an attorney fees clause that provides for reasonable attorney fees if the lease is referred to an attorney for enforcement. Accordingly, Moses Lake, Mr. Johnson, and Venture all sought attorney fees as prevailing parties. Finding that neither Venture nor Moses Lake was a prevailing party in its claims against the other, the trial court denied Venture's claim for attorney fees. The trial court awarded Moses Lake $30,580 in attorney fees as the prevailing party against Johnson, Inc. It also awarded Mr. Johnson $10,193 in attorney fees as the prevailing party against Moses Lake. Because it found that Johnson, Inc. was insolvent, the trial court concluded that the

"fair and just result" was to offset the fees awarded to Mr. Johnson from the amount owed to Moses Lake. Clerk's Papers (CP) at 47. The parties appeal and cross-appeal the dismissal of various claims and the award of attorney fees.

Conversion

Johnson, Inc. first contends that the trial court erred in dismissing its claim for conversion. It argues that Moses Lake failed to peaceably repossess the trucks outside the legal process, and that this failure constituted conversion.

The trial court dismissed the conversion claim on Moses Lake's CR 50(a)(1) motion for judgment as a matter of law. CR 50(a)(1) provides that, during a jury trial, the court may grant a motion for judgment as a matter of law if the nonmoving party has been fully heard on the issue and there is no legally sufficient basis for a reasonable jury to find for the nonmoving party. The trial court properly grants a motion for judgment as a matter of law if, after viewing the evidence in the light most favorable to the nonmoving party, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001) (quoting *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997)). Substantial evidence is the amount sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Id.* We apply the same standard in our review of a CR 50(a)(1) motion. *Id.*

The tort of conversion is the willful, unjustified interference with another person's entitlement to possession of chattel. *Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank*, 80 Wn. App. 655, 674-75, 910 P.2d 1308 (1996). To establish conversion, the plaintiff must show ownership and the right to possess the converted property. *Id.* at 675. Although the plaintiff is not required to have unqualified title to the property, he or she must at least have the right to possession or some property interest. *Malchow v. Boise Cascade Corp.*, 20 Wn. App. 258, 259, 578 P.2d 1337 (1978).

Johnson, Inc.'s right to possession was limited by the lease agreement, which provided that, upon default, the lessee would lose the right to possess the trucks and the lease would be terminated:

> Time is of the essence of this lease. In the event of Lessee defaulting in making of any payments or in the event Lessee fails to comply with any of the terms, covenants, conditions and undertakings herein to be performed, . . . the Lessor and/or its agents may without notice, liability or legal process, enter into the premises of or under the control o[r] jurisdiction of Lessee or any agent of Lessee where the said equipment may be, or by Lessor is believed to be, and repossess the equipment, with or without process of law, and the Lessee hereby waives all claims to damage in respect of such seizure and repossession. In such event, this lease shall terminate and be of no further force and effect and the Lessor shall be entitled to immediate possession of said equipment.

Plaintiff's Exs. 1, 2, 3, 4. Johnson, Inc. was undisputedly in default on its rent for the trucks in March 2001, and its attempt to purchase the three dump trucks was unsuccessful. Thus, the lease agreements gave Moses Lake the right to repossess the

property. *See Merchants Leasing Co. v. Clark*, 14 Wn. App. 317, 321, 540 P.2d 922 (1975) (terms of the lease gave the lessor the right to repossess).

Johnson, Inc. contends, however, that the repossession itself constituted a conversion because it was conducted outside the judicial process and breached the peace. RCW 62A.2A-525(2) provides that a lease agreement may require the defaulting lessee to make the goods available to the lessor for removal. This repossession may proceed "without judicial process if it can be done without breach of the peace." RCW 62A.2A-525(3). Johnson, Inc. argues that the trial court did not properly consider whether the repossession in this case breached the peace. It contends the evidence raises at least an issue of fact that should have gone to the jury.

"Breach of the peace" is not defined by the statute. This court in *Stone Machinery Co. v. Kessler*, 1 Wn. App. 750, 754-57, 463 P.2d 651 (1970) concluded that force, constructive force, or intimidation used to repossess property when the defaulting party offers physical resistance constitutes a breach of the peace and conversion. Here, employees of Johnson, Inc. confronted Moses Lake when it arrived to take possession of the trucks, and they rendered the trucks inoperable. These actions raised at least a reasonable inference that Moses Lake breached the peace by refusing to retreat after Johnson, Inc. physically resisted. *Id.* at 754-55. *See Guijosa*, 144 Wn.2d at 915 (judgment as a matter of law is inappropriate if there is substantial evidence or a

reasonable inference that could sustain a verdict for the nonmoving party).

But the trial court did not reach the issue of the evidence to support conversion. It concluded that Johnson, Inc. specifically waived any claim for damages due to repossession. As noted above, the lease agreements provide that the lessee waives all claims for damages resulting from repossession due to default. Johnson, Inc. offers no argument that this "no damage" clause in the leases is invalid. It also does not contend that the damages it seeks did not result from the repossession. Under the clear terms of the lease agreements, which are effective and enforceable (RCW 62A.2A-301), Johnson, Inc. could not recover under a theory of conversion arising from the repossession of the trucks. Accordingly, the trial court did not err in dismissing this claim in a judgment as a matter of law.

Equitable Contract Remedies

On cross appeal, Moses Lake challenges the trial court's dismissal of its claims against Venture based on implied contract, quasi contract and quantum meruit. Citing *Chandler v. Washington Toll Bridge Authority*, 17 Wn.2d 591, 137 P.2d 97 (1943), the trial court concluded that Moses Lake could not assert implied contract claims relating to the terms of the express lease agreements. Moses Lake contends its claims against Venture are not related to the lease agreements because Venture unjustly benefited from an unlawful sublease agreement with Johnson, Inc. Our review of the trial court's

conclusions of law is limited to determining whether the trial court's findings are supported by substantial evidence and in turn support the conclusion. *Ellenburg v. Larson Fruit Co.*, 66 Wn. App. 246, 250, 835 P.2d 225 (1992).

Washington recognizes two classes of implied contracts: those implied in fact and those implied in law. *Lynch v. Deaconess Med. Ctr.*, 113 Wn.2d 162, 164-65, 776 P.2d 681 (1989); *Chandler*, 17 Wn.2d at 600. Contracts implied in fact arise from circumstances that show mutual consent and an intent to contract. *Lynch*, 113 Wn.2d at 165; *Chandler*, 17 Wn.2d at 600. Contracts implied in law—also called quasi contracts—arise from an implied legal duty and are not based on consent. *Chandler*, 17 Wn.2d at 600. "Quasi contracts are founded on the equitable principle of unjust enrichment which simply states that one should not be 'unjustly enriched at the expense of another.'" *Lynch*, 113 Wn.2d at 165 (quoting *Milone & Tucci, Inc. v. Bona Fide Builders, Inc.*, 49 Wn.2d 363, 367, 301 P.2d 759 (1956)).

Moses Lake's claims do not rely upon a contract implied in fact because Moses Lake does not allege that it agreed to sublease the trucks to Venture. Instead, Moses Lake relies on a quasi contract theory, arguing that Venture subleased the trucks without notice and in violation of the lease agreements and was therefore unjustly enriched when it did not have to pay fair rental value.

Generally, a party to an express contract may not bring an action on an implied

contract relating to the same matter. *Chandler*, 17 Wn.2d at 604. The express contract here is a lease agreement between Moses Lake and Johnson, Inc., and Johnson, Inc. remained liable for the rent payments due to privity of contract, whether or not Moses Lake consented to a sublease. *See OTR v. Flakey Jake's, Inc.*, 112 Wn.2d 243, 250, 770 P.2d 629 (1989) (lease of real property). Because the lessor-lessee relationship arose from a valid written contract, any suit for rent owed must arise from the contract, not from an implied duty to pay. *See Chandler*, 17 Wn.2d at 605. Accordingly, the trial court's conclusion that Moses Lake could not recover from Venture under an implied contract theory or in quantum meruit is supported by the evidence and the law. This cause of action was properly dismissed on Venture's CR 50(a)(1) motion for judgment as a matter of law. *Guijosa*, 144 Wn.2d at 915.

Disregard of the Corporate Shield

After hearing the evidence of both parties, the trial court granted Venture's CR 50(a)(1) motion to dismiss Moses Lake's claim to disregard the corporate entity. On cross appeal, Moses Lake asserts it provided sufficient evidence to present this issue to the jury.

A corporate entity may be disregarded (1) if the corporate form was intentionally used to violate or evade a duty, and (2) if disregard is necessary to prevent unjustified loss to the injured party. *Meisel v. M&N Modern Hydraulic Press Co.*, 97 Wn.2d 403,

409-10, 645 P.2d 689 (1982); *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 924, 982 P.2d 131 (1999). The first element requires proof of abuse of the corporate form, such as fraud, misrepresentation, or manipulation of the corporation to the stockholder's benefit and the creditor's detriment. *Meisel*, 97 Wn.2d at 410; *One Pac. Towers Homeowners' Ass'n v. HAL Real Estate Invs., Inc.*, 108 Wn. App. 330, 350, 30 P.3d 504, 34 P.3d 834 (2001), *aff'd in part, rev'd in part on other grounds*, 148 Wn.2d 319, 61 P.3d 1094 (2002). The second element requires a finding that disregard is necessary to prevent actual harm to the party seeking relief. *Meisel*, 97 Wn.2d at 410. We review the facts supporting corporate disregard for substantial evidence and review de novo the legal conclusions drawn by the trial court. *Rogerson*, 96 Wn. App. at 924. Summary decisions for the corporation are appropriate if the injured plaintiff fails to present evidence to support these elements. *See Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 398, 47 P.3d 556 (2002) (summary judgment).

Moses Lake presented evidence that Johnson, Inc. and Venture shared the same officers, employees, and address, and argued that the two corporations had a single business purpose: Venture's construction projects. But the mere fact that corporations share officers, employees, a physical site, and common ownership of stock is insufficient to justify disregarding the separate corporate identities. *Minton*, 146 Wn.2d at 398; *Homeowners' Ass'n*, 108 Wn. App. at 350-51. The plaintiff must show that one

corporation's separate legal identity has been lost to the other, with evidence that the funds and property interests of the corporations are commingled, the entities have failed to observe corporate formalities, or that one is undercapitalized. *Homeowners' Ass'n*, 108 Wn. App. at 350-51. Further, the plaintiff must show that the corporation intended to work a fraud upon the plaintiff. *Minton*, 146 Wn.2d at 398; *Homeowners' Ass'n*, 108 Wn. App. at 350.

The trial court noted that Venture and Johnson, Inc. observed corporate formalities by carefully keeping separate books. On the other hand, the trial court also recognized that Moses Lake provided evidence of commingling (rental of the trucks by Johnson, Inc. for use by Venture), and the record suggests undercapitalization of Johnson, Inc. Accordingly, the trial court made no ruling on the first element. However, review of the record suggests that Moses Lake did not meet its burden of showing that Venture or Johnson, Inc. abused the corporate form with the intent to violate or evade a duty to Moses Lake. Johnson, Inc. attempted to purchase the dump trucks, which undercuts the argument that it rented the trucks with the intent to default or otherwise evade a duty on the leases. Even if, as Moses Lake contends, Johnson, Inc. intended to violate the lease agreements by subleasing the trucks to Venture without notice to Moses Lake, there is no evidence that this action was intended to harm Moses Lake. On balance, there is insufficient evidence to show misuse of the corporate form with intent to harm Moses

Lake. *Minton*, 146 Wn.2d at 398.

As for the second element, the record supports the trial court's conclusion that disregard of the corporate form was unnecessary to prevent loss to Moses Lake. The trial court found that Moses Lake had a remedy: to sue Johnson, Inc. or Mr. Johnson individually. *See Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 554, 599 P.2d 1271 (1979) (a corporate officer who participates in a corporation's wrongful conduct, or who approves of the conduct, is also liable for the penalties). This finding is supported by substantial evidence.

Viewed in the light most favorable to Moses Lake, the evidence is insufficient to support disregard of the corporate form. Specifically, Moses Lake fails to show that any manipulation of the corporate form was intended to harm Moses Lake, or that disregard of the corporate entities is necessary to avoid this harm. The trial court did not err in granting Venture's CR 50(a)(1) motion for judgment as a matter of law.

Attorney Fees

Finally, Venture; Johnson, Inc.; and Moses Lake contend the trial court erred in awarding attorney fees. Venture contends it is entitled to attorney fees as the prevailing party against Moses Lake's implied contract claims. Johnson, Inc. challenges the trial court's decision to offset the award to Mr. Johnson against the award to Moses Lake. On cross appeal, Moses Lake argues that the trial court awarded Mr. Johnson a greater

proportion of the total fees expended by the defendants than was justified. We review whether or not a party is entitled to attorney fees de novo. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993). The reasonableness of the amount of the fees is reviewed for abuse of discretion. *Am. Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 82 Wn. App. 646, 669, 920 P.2d 192 (1996), *aff'd*, 134 Wn.2d 413, 951 P.2d 250 (1998).

I. Fees for the prevailing party. A trial court may award attorney fees only if authorized by a contract, a statute, or by recognized equitable principles. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). The parties here sought attorney fees at trial on the basis of RCW 4.84.330, which provides that when a contract contains a provision for attorney fees, the prevailing party in an action on the contract is entitled to reasonable fees and costs. Each of the lease agreements contains a clause that states in part, "If this lease or any agreement of Lessee contained herein is referred to an attorney by Lessor for enforcement, Lessee will pay Lessor reasonable attorney's fees . . . and all other legal expenses." Plaintiff's Exs. 1, 2, 3, 4. Consequently, any party who prevails in an action to enforce the provisions of the leases is entitled to reasonable attorney fees and costs. RCW 4.84.330. This award is mandatory. *Marassi v. Lau*, 71 Wn. App. 912, 915, 859 P.2d 605 (1993).

Generally, a prevailing party is one who obtains a judgment in its favor. *Riss v.*

Angel, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). If both parties prevail on major issues, attorney fees are not appropriate for either of them. *Marassi*, 71 Wn. App. at 915 n.2. However, if neither of them wholly prevails, then the party that substantially prevails will be considered the prevailing party. *Id.* at 916.

Venture contends it is entitled to attorney fees for successfully defending against Moses Lake's claims based on implied contract, quasi contract, and quantum meruit. The trial court apparently agreed that it could have awarded fees on this basis, but concluded that neither Venture nor Moses Lake was a prevailing party because each was unsuccessful on some claims and successful on others:

> As between Moses Lake and Venture, I don't find that either party is the prevailing party. Venture was successful in defending against Moses Lake's claim that Venture should be liable pursuant to theories of implied contract/quasi contract/quantum meruit. On the other hand, Venture brought several tort claims against Moses Lake. I dismissed all but one of the tort claims. On the remaining claim, the jury found in favor of Moses Lake. So as between Moses Lake and Venture, I don't find either party to be the prevailing party.

CP at 47.

Although the trial court did not err in refusing to award attorney fees and costs to Venture or Moses Lake, its basic premise that fees were awardable is incorrect. None of the claims or counter claims between these two parties involved enforcement of the provisions of the leases. Moses Lake attempted to hold Venture liable for rent on a quasi

contract basis, not for violation of the actual lease terms. Additionally, Moses Lake's successful defense against the tort claims did not involve enforcement of the provisions of the leases. Because neither party prevailed in actions on the contracts, neither was entitled to attorney fees.

II. Proportionality award. The trial court found that Moses Lake was the prevailing party in its claims against Johnson, Inc. for breaches of the lease agreements. These same claims against Mr. Johnson individually were unsuccessful, however. Accordingly, the trial court awarded Moses Lake $30,580 in attorney fees and costs assessed against Johnson, Inc. To compute the attorney fees expended by Mr. Johnson in defending against Moses Lake's contract claims, the trial court divided the three defendants' total attorney costs (all three defendants were represented by the same counsel) by thirds. Mr. Johnson's one-third, or $10,193, was then offset against the $30,580 owed by Johnson, Inc. to Moses Lake. The trial court based this decision on the proportionality approach of *Marassi* and on its finding that it was harsh to award Moses Lake fees from an insolvent defendant while ordering Moses Lake to pay fees to the successful defendant who is the owner of the insolvent defendant. However, the proportionality approach is not applicable here, where separate claims were brought against separate defendants.

In *Marassi*, the plaintiffs sued a development company, initially alleging 12 claims

including breach of contract, negligence, fraudulent conveyance, and misrepresentation. 71 Wn. App. at 913-14. After voluntarily dismissing five claims, the plaintiffs litigated the remaining seven. The trial court found for the plaintiffs on two of the claims and dismissed the other five, awarding attorney fees to the plaintiffs as the prevailing parties. *Id.* at 914. On appeal, *Marassi* held that the alleged breaches of contract consisted of several distinct and severable claims. *Id.* at 917. Because determination of which party substantially prevailed was extremely subjective and difficult under the circumstances, *Marassi* held that a proportionality approach was more appropriate. *Id.* As defined by the court, "A proportionality approach awards the plaintiff attorney fees for the claims it prevails upon, and likewise awards fees to the defendant for the claims it has prevailed upon. The fee awards are then offset." *Id.*

What distinguishes *Marassi* from this case is the fact that all of the distinct and severable claims brought by the plaintiffs in *Marassi* were against the same defendant. Moses Lake sued three separate defendants. The trial court had already concluded that the corporate entities of Johnson, Inc. and Venture should not be disregarded, yet it apparently disregarded them by holding Mr. Johnson personally liable for Johnson, Inc.'s duty to pay Moses Lake's attorney fees and costs. An award to one defendant cannot be used to offset another defendant's liability to the plaintiff. Accordingly, the offset ordered by the trial court is vacated.

III. Computation of award to Mr. Johnson. Moses Lake also contends the trial court erred in determining that Mr. Johnson was entitled to one-third of the total attorney fees expended by the three defendants. As noted above, we review the reasonableness of the amount of fees awarded by the trial court for abuse of discretion. *Am. Nat'l*, 82 Wn. App. at 669.

Although Moses Lake contends defense attorneys dedicated only a small proportion of their time to Mr. Johnson's defense, it cites nothing in the record to support that allegation. The trial court observed that the defendants provided documentation to support their claim that the total fees should be divided in two for attorney fees expended on Mr. Johnson and Venture. Because this division would essentially award fees to Johnson, Inc. as well, the court rejected that approach. The trial court then reduced the defendants' total attorney fees to the sum expended by Moses Lake on attorney fees and divided by three for the amount owed to Mr. Johnson as the successful defendant.

"A trial court has broad discretion in determining the amount of attorney's fees to be awarded, so long as that award is reasonable and based on tenable grounds." *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 666, 935 P.2d 555 (1997). Here, we find that we cannot determine the reasonableness of the trial court's award of Mr. Johnson's attorney fees because the record does not reveal why the court divided the defendants' total fees by three. Accordingly, we remand for reconsideration of the attorney fees award. In so

doing, we encourage the trial court to exercise its broad discretion, especially in light of this court's vacation of the offset.

Judgment affirmed in part and remanded for reconsideration of attorney fees.

A majority of the panel has determined that this opinion will not be printed in the

Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Schultheis, A.C.J.

WE CONCUR:

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Brown, J.

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Kulik, J.